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No. 99-1613

In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY; MICHAEL MAHONEY; MYRON BEESON; and RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners and Respondent agree on one thing: "[W]hether Murphy was or was not acting as a law clerk is immaterial." Opp'n 5.[1] Whatever job Respondent held at Montana State Prison is, in and of itself, not material. What *is* material is whether Respondent was *giving legal advice* to his fellow inmate Tracy and, more importantly, whether prisoners like Respondent have an independent and free-standing right to provide legal assistance to other inmates protected by the First Amendment. Remarkably, Respondent denies that his letter was intended to give legal advice – a position not only flatly inconsistent with his arguments below but also one that effectively abandons the reasoning of the Ninth Circuit's decision – and adopts a tack that runs squarely into *Turner v. Safley*, 482 U.S. 78 (1987).

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[1] As discussed below, the linchpin of the Court of Appeals' decision was Respondent's status as a law clerk. However, it is plain from the court's analysis that the right relied upon is a constitutional entitlement on Respondent's part to give legal advice – an entitlement that is not necessarily dependent upon what job an inmate holds. The Court of Appeals decision may fairly be understood to apply to all inmates who seek to give legal assistance to other inmates, regardless of the inmate's position at the prison. Thus, while the Ninth Circuit clearly erred in deeming Respondent to have served in a law clerk capacity with respect to Murphy, the reasoning below is not restricted by its finding in this respect.

REPLY ARGUMENT

1. Respondent contends that he was not providing legal advice to Tracy. This argument cannot be reconciled with his arguments to the lower courts or with the Court of Appeals' analysis.

Before the District Court Respondent alleged that, "acting as a law clerk," he wrote to Tracy, "giving him advice and assistance regarding charges pending against him." Compl. at 3. He further stated in an affidavit that "[o]n or about February 16, 1995, I wrote a letter to Pat Tracy, in which I gave him legal advice concerning the charges against him." Opp'n App. 2. The District Court rejected the contention that Respondent had been acting as a law clerk and, in granting Petitioners summary judgment, analyzed his letter under constitutional standards applicable to simple inmate-to-inmate correspondence, "without consideration of any privilege that law clerk status might provide." Pet. App. 24-25. Before the Ninth Circuit, Respondent again pressed the notion that "the essence of [his] communication was, 'don't plead guilty, you may have a defense predicated upon the guard's reputation for treatment of other inmates.' " Appellant's Br. at 17. He then asked the Court of Appeals to reverse the District Court's conclusion that he was not acting as a law clerk when he wrote to Tracy. *Id.* at 43.

The Ninth Circuit accepted Respondent's argument, finding "the relevant facts" to be "undisputed: Respondent is a law clerk; his letter to Tracy contained legal advice; as applied to legitimate law clerk correspondence, Rules 009 and 022 are an 'exaggerated response' to the

Prison's interest in security and order, and thus impermissibly infringe Respondent's First Amendment rights." Pet. App. 15. Indeed, the Court of Appeals' opinion hinged on his status as a law clerk. *Id.* 7-8. Only because it deemed Respondent to enjoy such status did the court analyze his correspondence to determine the extent to which the prison infringed upon a newly-coined First Amendment right to render legal assistance to another inmate. It accordingly commented at the start of its substantive analysis that "[t]he viability of Respondent's First Amendment claim turns on the application of two established legal principles" – the first of which was a prior circuit determination "that inmates have a First Amendment right to assist other inmates with their legal claims." *Id.* 6. The court continued on to scrutinize the prison's actions in light of the four *Turner* factors and concluded that, although the prison's policy was logically related to the institution's legitimate safety and security concerns, those concerns were "at a low ebb when the correspondence in question is *legal advice*." *Id.* 12 (emphasis supplied); *see also id.* 13 (Respondent had no alternative methods by which he could "render legal assistance to maximum security inmates"); *id.* 13-14 ("prison officials could continue to monitor correspondence and discipline law clerks for any improper material that does not relate to legal action").

2. Respondent's justification for the Ninth Circuit decision is instead a broad assertion that prisons may not censor inmate-to-inmate correspondence based upon its content. *See* Opp'n 8 ("[Respondent] was punished for the content of his letter"). However, the content of inmate communications weighed heavily in *Turner* where this

Court held that prisons may *prohibit* inmate-to-inmate correspondence. Inmates, for example, may discuss escape strategies, plan disturbances or make threats against staff or other inmates – all of which would "threaten the core functions of prison administration, maintaining safety and internal security." *Turner*, 482 U.S. at 92. Contrary to Respondent's apparent position, implicit in the greater right to prohibit inmate-to-inmate correspondence is the lesser right to permit such communications subject to regulations of the type employed at MSP. The Court of Appeals effectively acknowledged this corollary by finding it necessary to recognize a free-standing constitutional entitlement for one inmate to give legal advice to another; i.e., were Respondent correct, the Ninth Circuit's reasoning was largely, if not entirely, beside the point.

Respondent's recasting of the basis for the Ninth Circuit's decision is betrayed tellingly by his assertion that no conflict exists between the decision and those in other circuits. Opp'n 6-8. The Court of Appeals nevertheless conceded that its holding conflicted with rulings from the Sixth, Eighth, and Tenth Circuits. Pet. App. 9 n.6. Only by modifying the rationale for the result below can Respondent argue that no inconsistency exists. The Ninth Circuit's opinion, no less than his own prior arguments, speaks for itself, and the decision below cannot be sustained unless the Court of Appeals was correct in fashioning a new constitutional doctrine.

CONCLUSION

The Ninth Circuit unequivocally concluded that "inmates have a First Amendment right to assist other inmates with their legal claims" and that "[t]he provision of legal assistance to fellow inmates is an activity protected by the First Amendment." Pet. App. 6, 9. This conclusion is the foundation for its decision. The issue before the Court is whether that foundation is sound.

For the foregoing reasons and the reasons in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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